

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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**UNITED STATES OF AMERICA**

**v.**

**RODNEY LAW**

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**CRIMINAL ACTION**

**NO. 05-78**

**ORDER AND MEMORANDUM**

**ORDER**

**AND NOW**, this 15<sup>th</sup> day of December, 2005, upon consideration of the Government's Motion in Limine to Admit "Other Act" Evidence Under Fed. R. Evid. 404(b) (Document No. 29, filed October 26, 2005), and Defendant, Rodney Law's Reply to the Government's Motion in Limine, (Document No. 41, filed November 17, 2005), **IT IS ORDERED** that, on the present state of the record, and for the reasons set forth in the attached Memorandum, the Government's Motion in Limine to Admit "Other Act" Evidence Under Fed. R. Evid. 404(b) is **DENIED**.

**IT IS FURTHER ORDERED** that the government is granted leave to seek reconsideration of this Order during the trial if warranted by the circumstances.

**MEMORANDUM**

**I. FACTS**

Defendant Rodney Law is charged with one count of possession with intent to distribute cocaine base ("crack") in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B), one count of possession with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C),

one count of possession of a firearm in furtherance of a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1)(A), and one count of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1).

The events leading to defendant's arrest occurred on June 21, 2004. At approximately 1:00 a.m. on that date, the Philadelphia police responded to a call from an apartment. Upon arriving at the location, the police officers were met by defendant and Tyiesha Falligan. Ms. Falligan told the police that defendant was holding a bag which contained items belonging to her. After police officers gave the bag to Ms. Falligan, she looked into it and placed it half-opened on the floor. An officer then looked into the bag and saw two stacks of bundled United States currency inside. Thereafter, the police arrested defendant and took the bag to the police station for inventory.

The police inventory of the bag disclosed \$16,913 in United States currency, approximately 128 grams of a white powder substance which tested positive for cocaine base, a mixing bowl, a mixer, and a scale, all with a powder residue on them. The police then obtained a search and seizure warrant for the apartment, where they recovered, among other items, a digital scale and plate, both covered with white powder residue, a loaded handgun, photographs of Ms. Falligan with defendant, and mail addressed to both Ms. Falligan and defendant.

## **II. MOTION IN LIMINE**

The government seeks to introduce testimony from two witnesses at trial regarding defendant's activities prior to his arrest. The first witness, Ms. Falligan, was defendant's girlfriend at the time of the arrest. According to the government, Ms. Falligan will testify, among other things, that she had seen the defendant sell crack and cocaine prior to his arrest. Gov.

Motion at 4. The second witness, Lawyan Moore, is a cooperating witness. The government states that Mr. Moore will testify that defendant sold drugs to him on numerous occasions and that he “knows Law to carry firearms to protect himself, his drugs and the proceeds from the drug trafficking and that he (Moore) was with Law on many occasions when Law possessed a firearm to protect himself from thieves and other drug dealers.” Id. This anticipated testimony from Ms. Falligan and Mr. Moore is the subject of the motion in limine.

### **III. DISCUSSION**

#### **A. Legal Standard**

In general, all relevant evidence is admissible. Fed. R. Evid. 402. However, evidence of “other acts” that to show a defendant’s propensity to commit crimes is prohibited. Government of Virgin Islands v. Harris, 938 F.2d 401, 419 (3d Cir. 1991). Federal Rule of Evidence 404(b) permits evidence of extrinsic acts under certain circumstances. The Rule provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . .

Fed. R. Evid. 404(b).

The Third Circuit has stated that Rule 404(b) is a rule of “inclusion,” not “exclusion.” United States v. Givan, 320 F.3d 452, 460 (3d Cir. 2003); United States v. Long, 574 F.2d 761, 766 (3d Cir. 1978). As the Supreme Court observed, in enacting Rule 404(b), “Congress was not nearly so concerned with the potential prejudicial effect of Rule 404(b) evidence as it was with ensuring that restrictions would not be placed on the admission of such evidence.” Huddleston v. United States, 485 U.S. 681, 688-89 (1988). As such, admission of “other acts” evidence is

avored if it is “relevant for any other purpose than to show a mere propensity or disposition on the part of the defendant to commit the crime.” Givan, 320 F.3d at 460, quoting Long, 574 F.2d at 765. However, simply because a proponent of other acts evidence invokes the proper uses of such evidence does not “magically transform inadmissible evidence into admissible evidence.” United States v. Morley, 199 F.3d 129, 133 (3d Cir. 1999). The proponent of Rule 404(b) evidence must articulate how such evidence is properly relevant. United States v. Sampson, 980 F.2d 883, 887 (3d Cir. 1992).

In order to admit “other acts” evidence under Rule 404(b), three requirements must be met: (1) the evidence must be offered for a proper purpose under Rule 404(b); (2) the evidence must be relevant; and (3) the probative value of the evidence must not be substantially outweighed by its potential for unfair prejudice under Rule 403. Huddleston, 485 U.S. at 691; Sampson, 980 F.2d at 886.

The government argues that the testimony from Ms. Falligan and Mr. Moore will be offered for several purposes permitted under Rule 404(b). According to the government, the testimony regarding defendant’s prior drug sales demonstrates his intent to sell the drugs seized by the police, Gov. Motion at 6-8, and “reduces the odds” that defendant possessed the seized gun and drugs by mistake. Id. at 9. The government also argues that testimony that defendant had previously sold drugs shows that defendant had a motive for using the gun seized by the police. Id. at 8. Finally, the government contends that testimony about defendant’s prior drug transactions shows that defendant had an opportunity to obtain significant quantities of cocaine and crack. Id. at 10.

In analyzing whether these proffered purposes meet the admissibility requirements of

Huddleston, the Court will consider, in turn, the evidence the government seeks to use to prove defendant possessed and intended to distribute drugs and the evidence the government seeks to use to prove defendant possessed a firearm and used it in furtherance of drug activity.

### **B. Evidence to Prove Drug Possession and Intent to Distribute**

The Court agrees that the government's stated purposes in offering testimony about defendant's previous drug transactions - to prove intent, knowledge, absence of mistake, and opportunity - are proper under Rule 404(b). Therefore, the first Huddleston requirement is met.

The next requirement is that the proffered evidence be relevant. Huddleston, 485 U.S. at 691. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. The Court concludes that testimony that defendant has sold drugs in the past is relevant to the issues of intent, knowledge, absence of mistake, and opportunity.

The third requirement for admission under Rule 404(b) is that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice under Rule 403.

Huddleston, 485 U.S. at 691. In deciding whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, the trial judge must appraise the "genuine need" for the evidence. United States v. Scarfo, 850 F.2d 1015, 1019 (3d Cir. 1988). "[T]he treasured principles underlying the rule against admitting evidence of other crimes should be relaxed only when such evidence is genuinely needed and would be genuinely relevant." United States v. Sriyuth, 98 F.3d 739, 748 (3d Cir. 1996) (emphasis added), quoting United States v. Cook, 538 F.2d 1000, 1003 (3d Cir. 1976).

The Court concludes that the probative value of defendant's prior drug transactions for showing knowledge, absence of mistake and opportunity is substantially outweighed by the danger of unfair prejudice. Based on the elements of the crimes charged and the information submitted by defendant, there is no genuine need to prove knowledge, absence of mistake, or opportunity. First of all, absence of mistake, and opportunity are not elements of the charges against defendant which the government must prove beyond a reasonable doubt. Furthermore, according to his reply to the government's motion, defendant is not claiming that he did not know what was in the bag or that he was mistaken as to its contents; it is defendant's position that the bag did not belong to him. Similarly, the issue of whether defendant had the opportunity to obtain a sizeable quantity of drugs is not a central issue in this case. Finally, the government has numerous other evidence to prove defendant possessed the drugs seized. See United States v. Barnes, 2005 WL 2994698, at \*6 (E.D. Pa. Aug. 16, 2005) (denying government's motion to introduce other acts evidence where the government was in possession "of a considerable amount of other evidence").

Because there is not a genuine need for evidence of defendant's prior drug transactions in order to prove knowledge, absence of mistake, or opportunity, the Court concludes that the evidence is of minimal probative value on these issues and that any probative value is substantially outweighed by the danger of unfair prejudice. Therefore, on the present state of the record, the evidence of prior drug transactions is not admissible to show defendant's knowledge, absence of mistake, or opportunity.

On the issue of defendant's intent to distribute the drugs seized by the police, the Court also concludes that the probative value of defendant's prior drug deals is substantially

outweighed by the danger of unfair prejudice. Evidence that defendant has previously sold drugs in a case charging possession with intent to distribute drugs might lead the jury to conclude that the defendant did possess the drugs seized in the present case and did intend to distribute them. The jury could “be inflamed by the evidence to decide that because the accused was the perpetrator of . . . other crimes, he probably committed the crime for which he is on trial as well,” regardless of what evidence the government offers about the crimes with which defendant is presently charged and whether that evidence establishes each element of each crime beyond a reasonable doubt. Sriyuth, 98 F.3d at 748, quoting Cook, 538 F.2d at 1003.

Therefore, the Court concludes, on the present state of the record, that the government is precluded from presenting testimony from Ms. Falligan or Mr. Moore regarding defendant’s prior drug transactions at trial in its case-in-chief.

## **B. Evidence to Prove Firearm Possession and Use in Furtherance of Drug Activity**

The government has two categories of evidence by which they seek to prove that defendant possessed the firearm seized by the police: testimony by both Ms. Falligan and Mr. Moore that defendant previously sold drugs, and testimony by Mr. Moore that defendant previously carried a firearm.<sup>1</sup> The Court will consider each of these lines of evidence in turn.

### **1. Defendant’s Prior Drug Sales**

The government offers testimony regarding defendant’s prior drug sales to prove that

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<sup>1</sup> According to the government’s motion, Moore will testify that he “knows Law to carry firearms to protect himself, his drugs and the proceeds from the drug trafficking and that he (Moore) was with Law on many occasions when Law possessed a firearm to protect himself from thieves and other drug dealers.” Gov. Motion at 4. The government’s motion does not state whether Mr. Moore will testify that he saw defendant carrying a firearm while selling drugs or just generally observed defendant carry a firearm. However, this distinction does not affect the Court’s decision.

defendant had a motive for carrying a firearm – that it was necessary to protect him in the dangerous business of the drug trade. The Court concludes that this is a proper purpose under Rule 404(b), and thus turns to the relevance analysis for this evidence.

Defendant has been charged with possession of a firearm in furtherance of a drug trafficking offense and with being a felon in possession of a firearm. In order to meet the burden of proof on both charges, the government must establish that defendant possessed the firearm that was seized. The government reasons that:

Street-level drug sellers, who carry large amounts of cash and drugs, often carry guns to protect themselves on the street. They are often the targets of junkies and robbers. They often owe money to their suppliers (who sometimes employ confrontational debt collection methods) and need to collect money from their customers. Since the evidence indicates that Law has been involved in drug dealing for an extended period of time, he is more likely to owe money to one or more suppliers. By the same token, he is more likely to have customers who owe him money. He is also more likely to be known in the community as a drug dealer and, hence, more likely to be targeted for a holdup.

Gov. Motion at 9.

The Court rejects the argument that evidence that defendant had previously sold drugs is relevant on the ground that it makes it more probable that the firearm seized from the apartment was used by the defendant in furtherance of a drug trafficking offense. While the Third Circuit has ruled that evidence that a defendant sold drugs was relevant and admissible to show that the defendant had a motive for carrying a firearm, the Court reached this conclusion in a case where evidence suggested that the defendant was negotiating a drug sale immediately prior to when he pulled out a firearm. United States v. Jacobs, 44 F.3d 1219, 1225 (3d Cir. 1995). In the instant case, however, it is not clear when Ms. Falligan and Mr. Moore witnessed defendant sell drugs. Furthermore, the Court has difficulty with the government's chain of logic. Simply because



defendant sold drugs at some time prior to his arrest does not mean he was a “street-level drug seller” at the time of his arrest. And even if defendant was a “street-level drug seller” at some time prior to his arrest, it does not necessarily follow that he possessed the gun that was seized in order to protect himself and his drugs.

Therefore, the Court concludes that evidence of defendant’s prior drug transactions is not relevant to prove that he had a motive to possess a firearm at the time of his arrest. On the present state of the record, the Court bars the government from offering testimony by either Ms. Falligan or Mr. Moore on this point.

## **2. Defendant’s Prior Possession of a Firearm**

Regarding Mr. Moore’s testimony that he “knows” defendant to carry a firearm and previously saw defendant carry a firearm, the Court concludes that this evidence is not offered for a proper Rule 404(b) purpose.

The proponent of other act evidence “must clearly articulate how that evidence fits into a chain of logical inferences.” United States v. Himelwright, 42 F.3d 777, 782 (3d Cir. 1994). The government does not provide any reasoning to connect defendant’s previous possession of a firearm with his intent to possess the gun seized by the police. The government cannot simply recite “the litany of knowledge, intent, absence of mistake, etc. without explaining how that evidence relates to the recited purposes.” Sampson, 980 F.2d at 888 (emphasis added). The most logical relationship is that because defendant carried a firearm in the past, he possessed the firearm seized by the police and used this particular firearm in furtherance of drug activity. This is evidence of other acts in order to show action in conformity therewith, which is exactly what Rule 404(b) prohibits. Furthermore, the probative value of this evidence is substantially

outweighed by the danger of unfair prejudice. There is a danger that the jury might infer from this testimony that defendant is a dangerous person who should be imprisoned regardless of the government's proof on the two gun charges.

Therefore, on the present state of the record, the Court concludes that evidence that defendant previously carried a firearm is not offered for a permissible purpose under Rule 404(b), and precludes the government from offering testimony by Mr. Moore on this subject.

#### **IV. CONCLUSION**

For the foregoing reasons, the Government's Motion in Limine to Admit "Other Act" Evidence Under Fed. R. Evid. 404(b) is denied. That denial is without prejudice to the government's right to seek reconsideration of this Order if warranted by evidence and/or arguments presented at trial.

**BY THE COURT:**

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**JAN E. DUBOIS, J.**